Supreme Court, U.S.
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No. 87-723

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

WILLIAM DOUGHERTY,

Petitioner,

vs.

PARSEC, INC., TRUCK DRIVER, CHAUFFEURS AND HELPERS, LOCAL UNION NO. 100 AND THE SEABOARD SYSTEM RAILROAD,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT THE SEABOARD SYSTEM RAILROAD IN OPPOSITION

Harold S. Freeman
Dinsmore & Shōhl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8271

Counsel of Record for Respondent,
The Seaboard System Railroad

Of Counsel:
Charles M. Roesch
Dinsmore & Shohl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8178

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

1. Whether section 301 of the Labor Manangement Relations Act preempts the claim of an employee, covered by a collective bargaining agreement, alleging tortious interference with his right to be discharged only for just cause.

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BRIEF FOR RESPONDENT THE SEABOARD SYSTEM RAILROAD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 34-59) is reported at 824 F.2d 1477. The opinion of the district court is set forth in Petitioner's Appendix B 60-75.

JURISDICTION

The judgment of the court of appeals (Pet. App. A 34-59) was entered on July 22, 1987. The petition for a writ of certiorari was filed on October 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 29 U.S.C. § 185(a), pertinent provisions of which are set forth in Appendix A.

DISCLOSURE OF CORPORATE AFFILIATIONS

The Seaboard System Railroad is a wholly owned subsidiary of CSX Corporation.

COUNTERSTATEMENT OF THE CASE

Petitioner William Dougherty ("Petitioner") was employed by Defendant Parsec, Inc. ("Parsec") as a crane operator. He was represented by the defendant Union, which had a collective bargaining agreement with Parsec. Parsec loaded and unloaded containers for The Seaboard System Railroad ("Seaboard") on Seaboard's premises, an operation in which Petitioner was involved. Petitioner was not employed by Seaboard nor was Seaboard a party to the labor agreement between Parsec and the Union.

Petitioner claimed that because he allegedly complained to OSHA about conditions at Seaboard's facility, Seaboard requested that Parsec discharge him. Parsec allegedly complied with Seaboard's wishes and terminated Petitioner, in violation of the provision in the collective bargaining agreement that provides that discharges shall be for just cause. Appellant filed a grievance under the collective bargaining agreement; the grievance culminated in arbitration as provided by the contract. Following exhaustion of the contractual grievance and arbitration procedure during which the Union represented Appellant, his discharge was upheld.

Petitioner filed a complaint in federal district court asserting that Parsec, his employer, breached its contract with the Union by discharging him without just cause and that the Union breached its duty to fairly represent him in the grievance and arbitration proceedings, conduct proscribed by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. In addition, Petitioner sued Seaboard for unlawfully interfering with his contractual employment rights with Parsec because "Seaboard's request that Appellant be discharged was a major and a determining factor causing

Defendant Parsec to terminate Plaintiff" in direct violation of the collective bargaining agreement's just cause provision.

Seaboard filed a motion to dismiss on the basis that the claim against it was pre-empted by section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The district court agreed, holding "[c]ommon sense tells us that any claim for tortious interference *with a contract* is substantially dependent upon analysis of the contract itself."

On appeal, the Sixth Circuit affirmed. The appellate court held that under this Court's teachings in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), Petitioner's claim of tortious interference with contract was pre-empted. The Sixth Circuit agreed with the district court's rationale holding that "[r]egardless of how the tortious interference with a contract claim is defined, the terms of the labor agreement will have to be scrutinized to determine if Seaboard induced its breach."

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW, IN ACCORD WITH THE DECISIONS OF OTHER COURTS, CORRECTLY APPLIED THE PRINCIPLES SET FORTH BY THIS COURT IN *ALLIS-CHALMERS*.

The Sixth Circuit Court of Appeals simply and narrowly held that Petitioner's claim of tortious interference with contract is pre-empted by section 301 of the Labor Management Relations Act because it is "inextricably intertwined with considerations of the terms of the labor contract." *Dougherty* v. *Parsec, Inc.*, 824 F.2d 1477, 1478 (6th Cir. 1987). The court correctly recognized that the contract with which Seaboard is alleged to have interfered is the collective bargaining agreement and that agreement "is exclusively to be interpreted under federal law." This decision appropriately applies the principles set forth by this Court in *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202 (1985), and is in accord with the decisions of other courts that have addressed the issue.

a. The Sixth Circuit Properly Applied *Allis-Chalmers*.

In *Allis-Chalmers*, this Court engaged in an extensive analysis and set forth the applicable principles for determining when a state tort claim is pre-empted by section 301 of the Labor Management Relations Act. In pre-empting the claim at issue therein, this Court held that if the "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract" it is pre-empted. *Id.* at 213.

The Sixth Circuit properly applied this principle here. There simply can be no resolution of the state law claim absent an analysis and interpretation of the collective bargaining agreement. This is because under Ohio law a critical element of the state claim is the intentional procurement of a breach of the contract at issue. *See Cincinnati Bengals, Inc.*

v. *Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (applying Ohio law); *see also Heheman* v. *E.W. Scripps Co.*, 661 F.2d 1115, 1126-27 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); *Juhasz* v. *Quick Shops, Inc.*, 55 Ohio App. 2d 51, 57, 379 N.E.2d 235 (1977).

As the Sixth Circuit correctly held, the collective bargaining agreement is the contract that governs under what circumstances Petitioner may be discharged and is the contract Petitioner, through his complaint, claims was violated. Thus, any resolution of the state claim necessarily requires an interpretation of the collective bargaining agreement to determine whether Seaboard had intentionally procured a breach of that agreement. As the district court held "[c]ommon sense tells us that any claim for tortious interference *with a contract* is substantially dependant upon analysis of the contract itself." Pet. App. B 67-68. Accordingly, an evaluation of the tort claim is "inextricably intertwined" with and entirely dependent upon the breach of the labor agreement between Parsec and the Union. As such, it is pre-empted by section 301.

As stated by this Court, rights that are negotiable or that can be altered by the parties by agreement are pre-empted by section 301. *Allis-Chalmers*, 471 U.S. at 213. The right Petitioner asserts herein is the right not to be discharged without just cause. The very existence of the just cause provision in the labor contract and the fact that it was negotiated into the agreement conclusively disproves Petitioner's assertion that the right is "a non-negotiable right."

Furthermore, under Ohio law, in the absence of some agreement to the contrary, an employee who is hired for an indefinite period is terminable at-will. *Phung* v. *Waste Management, Inc.*, 23 Ohio St. 3d 100, 491 N.E.2d 1114 (1986); *Henkel* v. *Education Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976). The just cause provision of the collective bargaining agreement undeniably *alters* that at-will relationship and provides him with a *negotiated* right protecting him from discharge. Thus, Petitioner's rights and

protections concerning grounds for discharge are negotiable and alterable rights that bring his claim within the pre-emptive scope of section 301.

For the first time, Petitioner now claims it is the right to be free from interference from outsiders that he seeks to protect and claims this right arises out of Ohio law, not the labor agreement. What Petitioner fails to recognize is that to the extent such a right exists it was negotiated into and encompassed by the just cause provision of the collective bargaining agreement, which governed the basis upon which Petitioner could be discharged. Accordingly, the right is subject to negotiation and alteration through the collective bargaining process and is pre-empted by section 301.

Allowing Petitioner's tortious interference with contract claim to proceed outside the scope of section 301 runs afoul of the goal of providing uniform federal interpretation of collective bargaining agreements. *See Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 647 F.2d 372, 380-381 (3rd Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982). For example, if Petitioner were permitted to proceed with separate actions in state and federal court, the state court, under Ohio law, would be conferred with the responsibility of interpreting the contract's just cause provision to determine if it had been breached. This is so because, as previously noted, under Ohio law one element of the tort is the intentional procurement of a breach of the contract. *See Cincinnati Bengals, Inc.* v. *Bergey*, 453 F. Supp. 129, 145 (S.D. Ohio 1974) (applying Ohio law); *Heheman* v. *E.W. Scripps Co.*, 661 F.2d 1115, 1126-27 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982). This arrangement potentially could lead to directly contradictory interpretations and decisions between the federal and state courts on the issue of whether the labor agreement had been breached. In addition, it could substantially broaden the remedies available for breach to include attorney's fees and punitive damages. Such a result "would jeopardize the dominant policy goal behind preemption, i.e., the uniform federal interpretation of labor contracts" and simply is not permissi-

ble under *Allis-Chalmers*. *Cf. Allis-Chalmers*, 471 U.S. at 211. The application of the *Allis-Chalmers* principles by the Sixth Circuit were correct and do not warrant a review by this Court.

b. The Sixth Circuit's Decision Is In Accord With The Decisions Of Other Courts That Have Decided The Issue.

Other federal courts consistently have held that state tortious interference suits are pre-empted by section 301.[1] *Lingle* v. *Norge Division of Magic Chef*, 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 56 USLW 3268 (1987) (when employee covered by collective bargaining agreement claims interference with employment contract, claim stems directly from the labor agreement and is pre-empted); *Scott* v. *Machinists Lodge 190*, 827 F.2d 589, 591-92 (9th Cir. 1987) ("Interference with contract relations is obviously connected with interpretation of the contract."); *Hillard* v. *Dobelman*, 774 F.2d 886, 887 (8th Cir. 1985) ("evaluation of the state tort claim depends upon interpretation of the collective-bargaining agreement"); *Evangelists* v. *Inlandboatmen's Union*, 777 F.2d 1390, 1400 (9th Cir. 1985) (resolution of claim turns upon interpretation of labor agreement); *Mitchell* v. *Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986) (tortious termination claim pre-empted by just cause provision); *Peterson* v. *Air Line Pilots Association*, 759 F.2d 1161, 1170 (4th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) (if plaintiff recovers on state interference claim it will be because he establishes federal law violation); *Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 647 F.2d 372, 380-81 (3rd Cir. 1981), *cert. denied*, 454 U.S.

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[1] This Court has, analogously, struck down, as pre-empted by the National Labor Relations Act, claims of tortious interference with employment contracts. *Operating Engineers Local 926* v. *Jones*, 460 U.S. 669 (1983); *accord Iron Workers* v. *Perko*, 373 U.S. 701 (1963); *Satterfield* v. *Western Electric Co.*, 758 F.2d 1252 (8th Cir. 1985).

1143 (1982) (tortious interference claim against non-signatory to collective bargaining agreement pre-empted). This litany of decisional authority reinforces the propriety of the Sixth Circuit's decision herein and counsels against the issuance of the writ by this Court.

In summary, an application of the principles enunciated by this Court's decision in *Allis-Chalmers* mandated that Petitioner's claim of tortious interference with contract be pre-empted by section 301. The Sixth Circuit correctly so held. In addition, when presented with the issue, numerous other courts have reached the same decision. Accordingly, the decision below was proper and does not warrant further review by this Court.

II. THE ISSUE OF WHETHER SECTION 301 PROVIDES FOR A REMEDY AGAINST A NON-SIGNATORY WAS NOT PRESENTED TO THE COURT BELOW AND IS NOT PROPERLY BEFORE THIS COURT.

Petitioner argues that this Court should issue the writ to resolve an alleged conflict in the Circuits concerning whether section 301 provides a remedy for a non-signatory to a collective bargaining agreement. Petitioner, however, never raised this issue before either the district court or the Sixth Circuit Court of Appeals. In those lower proceedings, he simply cited the Sixth Circuit's opinion in *Service, Hospital, Nursing Home & Public Employees Union* v. *Commercial Property Services, Inc.*, 755 F.2d 499 (6th Cir. 1985), *cert. denied*, 474 U.S. 850 (1985) as authority for the proposition that no cause of action existed against Seaboard as a non-signatory. At no time did he request that the Sixth Circuit examine or reconsider that decision. Accordingly, it was not raised as an issue, addressed or decided by the appellate court.

As this Court has repeatedly stated: "Where issues are neither raised before nor considered by the Court of Appeals,

this court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *accord Brandon* v. *Holt*, 469 U.S. 464, 473 n.25 (1985); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). Only under exceptional circumstances will this Court review an issue not presented in the court below. *Lawn*, 355 U.S. at 362-363 n.16. In the instant case, no exceptional circumstances exist, and accordingly, the issue is not properly presented for this Court's review.

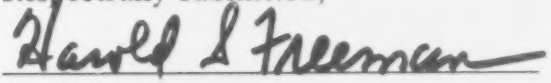
In addition, the thrust of Petitioner's argument is that the Sixth Circuit's decison was "extremely harsh" because it left him with no remedy against Seaboard. This result, however, is no different than the one created by this Court's decision in *Allis-Chalmers*. In that case, plaintiff's tort claim for bad faith handling of his insurance claim against both his employer and an insurance company was held preempted by section 301. Thus, plaintiff was left with a potential section 301 claim against his employer and no remedy against the non-signatory insurance company. In this case, the Sixth Circuit's proper application of *Allis-Chalmers*, which created the identical result, merits no review by this Court.

Furthermore, even as presented by the Petitioner, the Courts of Appeals reflect relative uniformity of opinion with the one aberration being the Third Circuit. *Compare Service Employees*, *supra; Loss* v. *Blankenship*, 673 F.2d 942 (7th Cir. 1983); *Carpenters Local Union* v. *Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983) *with Wilkes-Barre Publishing Co.* v. *Newspaper Guild*, 647 F.2d 372 (3rd Cir. 1982), *cert. denied*, 454 U.S. 1143 (1982). Respondent submits that one court's aberrant decision rendered eight years ago does not create a split in the circuits sufficient to merit this Court's review.

CONCLUSION

For the reasons set forth above, Respondent, The Seaboard System Railroad, respectfully submits that the writ be denied.

Respectfully submitted,



Harold S. Freeman
Dinsmore & Shohl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8271

Counsel of Record for Respondent,
The Seaboard System Railroad

Of Counsel:
Charles M. Roesch
Dinsmore & Shohl
2100 Fountain Square Plaza
511 Walnut Street
Cincinnati, Ohio 45202
(513) 977-8178

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief for Respondent, The Seaboard System Railroad, in Opposition was sent by regular United States mail, first class, postage prepaid, this 17th day of November, 1987, upon:

Paul H. Tobias, Esq.
Tobias & Kraus
911 Mercantile Library Building
414 Walnut Street
Cincinnati, OH 45202

George Edward Yund, Esq.
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202

Jonas B. Katz, Esq.
Gettler, Katz & Buckley
6 East Fourth Street
Cincinnati, OH 45202

Charles M Roesch

APPENDIX A

29 U.S.C. § 185

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * *